No. 1023 (October Term, 1940).

IN THE

SUPREME COURT OF THE UNITED STATES.

OCTOBER TERM, 1941.

A. J. PICKETT, General Chairman of the Brotherhood of Railway and Steamship Clerks, Freight Handlers, Express and Station Employes, Duly Authorized Representative of James Foster and Others,

Petitioner,

vs.

THE UNION TERMINAL COMPANY, a Corporation,

Respondent.

On Writ of Certiorari to the United States Circuit Court of Appeals for the Fifth Circuit.

REPLY BRIEF OF PETITIONER.

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REPLY BRIEF OF PETITIONER.

WAGE MUST BE PAID BY EMPLOYER.

Respondent does not and cannot deny that the Fair Labor Standards Act imposes upon it, as the **employer**, the duty to **pay a wage** (of not less than a specified amount) to each of its employees.

Respondent recognizes that this obligation can be discharged only by payment **out of funds** belonging **to it as employer.**

The language of the act, imposing this obligation is clear and unambiguous: "Every employer shall pay to each of his employees engaged in commerce—wages." (Note that it does not say that each employee shall receive as his hourly or daily compensation money of not less than a specified amount. **The amount received under this law must come from the employer.**)

CHARACTERISTICS OF TIPPING SYSTEM.

Recognizing that the obligation laid upon the employer can be discharged only by payment out of the funds of the employer, respondent seeks to assert ownership of the **tips** given by passengers to redcaps, and to appropriate them to the discharge of its obligation. This cannot be done for the following reasons:

At the time the Fair Labor Standards Act went into effect and prior thereto, the tipping system was in effect.

This system had the following characteristics:

(a) No wage was paid redcaps by respondent;

(b) No charge was made by respondent (or by the redcaps) for any service rendered;

(c) All moneys received by redcaps came from passengers as their voluntary act. What they gave was a pure tip or gratuity;

(d) Passengers generally understood that, when they gave tips to redcaps, the money became the property of the redcaps and not of the respondent;

(e) Respondent did not claim or assert any ownership of the money handed redcaps by the passengers. "They knew that what they paid did not go to the terminal company, but was the meat and bread of the redcap." [Wil-

liams v. Jacksonville Terminal Co., 118 Fed. (2nd) 324, l. c. 326.] The nature of this system then in effect is made clear by Judge Otis in the following language:

> "To say that, within the intention of Congress as expressed in the Fair Labor Standards Act, the defendant paid wages to redcaps when it permitted them to accept tips from travelers is to assume that Congress did not know the generally accepted meaning of simple words. But they did know the generally accepted meaning of simple words. They knew what the word 'wages' means in common, present day, understanding. They knew what a 'tip' is. Certainly any member of Congress would have been amazed if he had been told, when he handed to the bellboy in his Washington hotel a tip, that the hotel company was paying the bellboy his wages. If Congress had intended that tips should be included in the meaning of the word 'wages' it would have said so" (Harrison v. Kansas City Terminal Railway Co., 36 F. Supp. 434, l. c. 437).

NOTICE DID NOT CHANGE TIPPING SYSTEM.

The notice served on the redcaps on October 22, 1938, did not abolish the tipping system or even purport to do so. The relations between the redcaps and the public remained the same; the redcaps were still to take **tips.** No change was effected between the **respondent** and the **public. No charge was imposed by respondent and none permitted by the redcaps.** The money which came from the public to the redcaps came just as it had come prior to the notice —as **tips.** The passengers who handed a redcap a tip before the notice intended it to be his "bread and meat" and manifestly so intended after the notice.

The only thing which respondent sought to change by the notice was the personnel of the **tippee.** Whereas the redcaps had theretofore been the beneficiary of the tips,

it proposed, by this notice to make itself the beneficiary. It proposed that thereafter the public should be permitted to tip—not the redcaps—but the Union Terminal Company, the respondent.

COMMON CARRIER CANNOT RECEIVE TIPS.

By this device respondent sought to lay hands on the tips, establish ownership of them and apply them to the payment of the statutory minimum wage.

Its purpose failed for two reasons:

(a) Because it failed to secure the consent of the redcaps to appropriate their property.

(b) Because, under the law and sound public policy, the respondent, as a common carrier, could not, even with the consent of the redcaps, be the recipient and beneficiary of tips, or assert ownership to money so received.

Proposition (a) has been so fully discussed in our original brief, and in the brief filed by the Solicitor General on behalf of the Administrator of the Wage and Hour Division as amicus curiae, that we shall add nothing more.

With respect to proposition (b) we say, frankly, that there is something positively revolting in the attempt of a **common carrier** to establish itself as the beneficiary of **tips.**

VICE OF THE TIPPING PRACTICE.

This attempt of respondent to make itself the beneficiary of tips becomes all the more revolting when we take a look at the inherent nature of the tipping system. We quote what eminent authority has had to say with respect to tipping:

The Supreme Court of Massachusetts has expressed

itself on this point—Power's Case, 275 Mass. 515, 176 N. E. 621, quoting from page 519 (623 of 176 N. E.):

> "The idea of tipping is distasteful to some people who would prefer to pay in increased charges enough to enable the appropriate wage to be paid directly to the employee by his employer. There is a feeling that tips are not in harmony with the spirit of American institutions and that they tend to put the recipient in a dependent or servile position and to undermine independence of character."

We quote a few excerpts from articles in well-known magazines, which proceed in a similar vein:

> "The tip is essentially degrading. It is twice curst; it curseth him that gives and him that takes. It gives to the one a feeling of patronage, and to the other a feeling of sycophancy. Customary as the habit has become, especially in restaurants, we are glad to see that most men cannot give or receive a tip without something in their manner indicating that they are ashamed of the act. The sneaking, careless or disdainful way with which the donor bestows his money and the furtive or oblivious manner in which it is gathered up are in marked contrast with the open and even exchange of money for merchandising across the counter. It is not true, as some argue, that it is just the same thing as though the service had been charged for in the bill. The mere fact that the amount is dependent on the caprice of the patron puts the employee in the position of inferiority, and takes the transaction out of the class of businesslike exchanges." The Independent, Vol. 55, p. 2068 (1903).

> "The employee hates being forced to seek as a condescending favor what should be his just due for work done." "Shall We Abolish Tipping?"—Reader's Digest, Vol. 33, No. 198, p. 107 (1938).

> "One of our best and most permanent evils is tipping. • • • Tipping itself is an offense to the code of American business ethics. It belongs in countries

where begging is a recognized life calling, where petty bribery of government employees is a recognized channel of revenue, where class distinctions are sharp and oppressive, and where cultivated servility is an art. But the custom is rooted in the United States, and it will grow and thrive until the great army of the tipped rises in rebellion and creates and demands a right to straight pay."—Collier's Weekly, July 30, 1927, Vol. 80, page 46.

"What, may I ask, is more un-American than tipping? It doesn't belong in American society. It doesn't belong in a democracy. It is the product of lands where for centuries there has been a servile class. Why should redcaps at railroad stations be dependent for a living entirely on the generosity of the traveler, and why should the traveler be annoyed and influenced by his fear of seeming cheap? There should be a fixed price for the carriage of each and every piece of luggage."—Vol. 99 of Forum, p. 231.

"Tipping, as a throwback to feudal times, is a mark of servitude. It is out of keeping with high business ethics and it stifles the desire to dignify one's profession. It makes for class distinction and has about as much place in a democratic society as the feudal lance, the rapier and the knout. It is hypocritical, absurd and undemocratic."—Rotarian, Vol. 56, p. 28 (June, 1940).

REDCAP SERVICE IS TRANSPORTATION SERVICE.

Redcap service is a transportation service. The Interstate Commerce Commission so ruled in Case No. 28,495, 244 I. C. C. 41, entitled Ida M. Stopher v. Cincinnati Union Terminal Co., Inc., decided June 25, 1941.

For the respondent now to persist in its attempt to defend its claim to the money received by the redcaps is to assume the burden of justifying its receipt of **tips in transportation service.** The very suggestion is abhorrent. To

countenance such a practice is to strike at the very foundations of fair, equal and nondiscriminatory service, which carriers are obligated to render.

Such a practice would fly in the teeth of Section 2 of the Interstate Commerce Act (Title 49, U. S. C. A., Section 2) which, for convenience, we set out again:

> "Sec. 2. Special rates and rebates prohibited. If any common carrier, subject to the provisions of this chapter, shall, directly **or indirectly**, by any special rate, rebate, drawback, **or other device**, charge, demand, collect, **or receive** from any person or persons, a greater or less compensation for any service rendered, or to be rendered, in the transportation of passengers or property or the transmission of intelligence, subject to the provisions of this chapter, than it charges, demands, collects, or receives from any other person or persons for doing for him or them a like and contemporaneous service in the transportation or transmission of a like kind of traffic or message under substantially similar circumstances and conditions, such common carrier shall be deemed guilty of unjust discrimination, which is prohibited and declared to be unlawful." (Emphasis ours.)

Section 1 (17) (b) of the Interstate Commerce Act [Title 49, U. S. C. A., Sec. 1 (17) (b), as amended September 18, 1940] recognizes that the giving to an employee of a carrier of any thing of value to cause him to favor one shipper over another in the supply, distribution or movement of cars used in the transportation of property is contrary to the policy of the Act, and makes such an act criminal, and a fortiori, should the payment of tips or gratuities to a carrier itself be contrary to the policy of the Act. This section of the Act reads as follows:

> "(b) It shall be unlawful for any person to offer or give or cause or procure to be offered or given, directly or indirectly, any money, property, or thing of value, or bribe in any other form whatsoever, to

any person acting for or employed by any carrier by railroad subject to this part with intent to influence his decision or action, or because of his decision or action, with respect to the supply, distribution, or movement of cars or other vehicles, or vessels, used in the transportation of property. It shall be unlawful for any person acting for or employed by any carrier by railroad subject to this chapter to solicit, accept, or receive, directly or indirectly, any money, property, or thing of value, or bribe in any other form whatsoever, with intent to be influenced thereby in his decision or action, or because of his decision or action, with respect to the supply, distribution, or movement of cars or other vehicles or vessels, used in the transportation of property. Any person who violates the provisions of this subparagraph shall be deemed guilty of a misdemeanor and be subject for each offense to a fine of not more than $1,000, or imprisonment in the penitentiary for a term of not more than two years, or both such fine and imprisonment."

RESPONDENT MADE NO CHARGE AND THEREFORE COULD NOT ACQUIRE MONEY RECEIVED AS TIPS.

Respondent could come into ownership of this money only in the same way by which it acquires money in the transportation service: **by receiving it in payment of charges lawfully made.**

In this case it not only did not file a tariff, as required by Section 6, Par. 7, of the Interstate Commerce Act (Title 49, U. S. C. A., Sec. 6, par. 7), set out at page 80 of our original brief, but it made no charge in any manner or form. It **did not pretend to make a charge.** Any suggestion of a charge would be a pure afterthought.

If it be suggested that by our condemnation of **tipping in the transportation service** we, at the same time, con-

demn the receipt of tips by redcaps, for redcaps, and that they should not have received such money, then we answer that this would be no defense of the carrier's claim to the money. The law in such event would leave the money where it finds it—in the hands of the redcaps.

The upshot of the whole matter is that respondent is trying to pay a debt imposed upon it by law by the use of other people's money, which, of course, cannot be done.

Respondent cannot absolve itself from its obligation by pleading that the redcaps have already received money equal in amount to the minimum wage, and, therefore, that no further payment should be made. The question is not: "how much did the redcaps receive?" but **"how much did the respondent pay?"** Redcaps might have received the equivalent of the minimum wage from rentals of property owned by them, or from bequests from others. Would that have discharged respondent's obligation? The question answers itself. The clear, emphatic, unambiguous language of the act is that **"every employer shall pay."**

When a court decrees that an employer **shall pay** a debt clearly imposed by law, that's not "judicial brigandage"; that's compliance with law; that's justice. When a court lays on the penalty fixed by the lawmakers for failure to comply with a clear mandate of the law—that again is nothing more or less than compliance with the law to which the exalted as well as the lowly must bow.

We think it not inappropriate to observe that the receipt by men—black or white—who render the high order of service performed by redcaps, of three times the pitiful minimum regularly allowed, is not such a "bonanza" for these worthy men as to move a dignified judge to "holy" wrath or "righteous" indignation. It would not be unseemly for someone to suggest that at least for a

brief period redcaps are receiving something like fair compensation for the fine service they render the public **and the carriers.** In this connection the Court should take judicial notice of the recent wage settlement between the carriers and the employes, made December 15, 1941, in which the **minimum** for redcaps represented in that settlement was fixed at 46 cents per hour.

THIS COURT MAY DETERMINE WHETHER THE RESPONDENT MAY MAKE ITSELF THE RECIPIENT OF TIPS, AND NO PRIOR RULING BY THE INTERSTATE COMMERCE COMMISSION IS NECESSARY.

Respondent endeavors to dispose of petitioner's point that respondent cannot claim ownership of the tips received by the redcaps because by so doing it would be charging or receiving from one passenger more than it does from another for the same or similar service, in violation of Section 2 of the Interstate Commerce Act, and that a carrier cannot be the recipient of tips or gratuities, by saying that the Court cannot consider this argument until there has first been a ruling thereon by the Interstate Commerce Commission. It cites a number of cases which it contends sustain its position. A reading of these cases discloses, however, that the only cases in which there must first be a ruling by the Interstate Commerce Commission are those cases which involve rate making or the determination of whether a certain service is included in a certain rate and the like, where a ruling by the Interstate Commerce Commission is necessary to preserve uniformity, and to prevent discrimination because one court might hold that a certain service was included in a certain rate and another court might hold to the contrary. There is no necessity for the Interstate Commerce Commission first passing on a matter where the Interstate Commerce Law

is clear and requires no ruling by the Commission. This was recognized by this Court in the case of Pennsylvania Railroad Company v. International Coal Mining Company, 230 U. S. 184, 57 L. Ed. 1446. In this case the International Coal Mining Company sued the Pennsylvania Railroad Company for $37,268.00, being the difference between the rates paid by plaintiff and lower rates resulting from rebates allowed other coal dealers making like shipments over the same road from the same point to the same destination. The defendant contended that the case should be remanded with instructions to dismiss the complaint on the ground that courts had no power to adjudicate the administrative question as to whether a carrier could make a difference in rate between shipments of free and contract coal. It argued that this was a rate-making question, and that it was for the Interstate Commerce Commission as the rate regulating body to determine, not only whether a dissimilarity existed, but whether the rates were properly adjusted to meet that dissimilarity. In disposing of this question the Court said (230 U. S., l. c. 196, 197, 57 L. Ed., l. c. 1451):

> "Under the statute there are many acts of the carrier which are lawful or unlawful according as they are reasonable or unreasonable, just or unjust. The determination of such issues involves a comparison of rate with service, and calls for an exercise of the discretion of the administrative and rate-regulating body. For the reasonableness of rates, and the permissible discrimination based upon difference in conditions, are not matters of law. So far as the determination depends upon facts, no jurisdiction to pass upon the administrative questions involved has been conferred upon the courts. That power has been vested in a single body, so as to secure uniformity and to prevent the varying and sometimes conflicting results that would flow from the different views of the same facts that might be taken by different tribunals.

"None of these considerations, however, operates to defeat the courts' jurisdiction in the present case. For even if a difference in rates could be made between free and contract coal, none was made in the only way in which it could have been lawfully done. The published tariffs made no distinction between contract coal and free coal, but named one rate for all alike. That being true, only that single rate could be charged. When collected it was unlawful, under any pretense or for any cause, however equitable or liberal, to pay part back to one shipper or to every shipper. * * *

"In view of this imperative obligation to charge, collect, and retain the sum named in the tariff, there was no call for the exercise of the rate-regulating discretion of the administrative body to decide whether the carrier could make a difference in rates between free and contract coal. For whether it could do so or not, the refund of any part of the tariff rate collected was unlawful. **It could not have been legalized by any proof, nor could the Commission by any order have made it valid. The rebate being unlawful, it was a matter where the court, without administrative ruling or reparation order, could apply the fixed law to the established fact that the carrier had charged all shippers the published or tariff rate, and refunded a part to a particular class.**" (Emphasis ours.)

The Court in a similar case, Mitchell Coal Company v. Pennsylvania Railroad Company, 230 U. S. 247, l. c. 266, 57 L. Ed. 1472, l. c. 1480, said:

"The so-called allowance, regardless of the amount, was a mere gift—a rebate, absolutely forbidden by the statute and ipso facto illegal. **Being an act prohibited by law, it was not necessary to have any preliminary decision to that effect by the Commission, but the courts could, as in any other case, apply the law to the facts proven and award damages to the person injured.**"

The case at bar falls within the principle laid down by

this Court in the Pennsylvania Railroad Company cases, for it is well known, and the Court should take judicial notice of the fact, that there is no uniformity in the amount of tips given by passengers for the same or similar service, and the Interstate Commerce Law plainly provides that charges must be uniform for the same or similar service. There is no finding the Interstate Commerce Commission could make in this case which could justify or excuse the respondent's charging more of one passenger than of another for the same or similar redcap service, or by any device attempting to make itself the recipient of tips or gratuities given its employees.

RESPONDENT'S RELIANCE ON THE ACCOUNTING AND GUARANTY PLAN NECESSITATES THIS COURT'S DETERMINING WHETHER A COMMON CARRIER CAN LEGALLY MAKE ITSELF THE RECIPIENT OF TIPS.

Respondent attempts to eliminate the Interstate Commerce Act points from the case, saying that the redcaps are in no position to raise these questions because any complaint must come from some person affected, such as the passengers. This is not a case, however, where petitioner or the redcaps are coming into court and asking any **affirmative** action of the Court outlawing an arrangement requiring the redcaps to turn over their tips, but, instead, respondent is asking the Court to put its stamp of approval on the legality of the accounting and guaranty arrangement under which it contends that it was making a charge for redcap service in the form of tips, admittedly not uniform, and by which it contends it became the owner and recipient of these tips. If the Court holds this arrangement legal it will necessarily have to disregard the plain terms of Section 2 of the Interstate Commerce Act, because it will have to hold that a common carrier may be the recipient of tips,

and that respondent may make a charge for redcap service in the form of tips, even though the charges are not uniform in amount. The necessity for the Court passing on this question is brought into the case by respondent's contention that the tips were its charges for redcap service, and that it could and did become the owner of these tips, and clearly petitioner has the right to contend that the arrangement is illegal under the above referred to sections of the Interstate Commerce Act.

FALLACY OF RESPONDENT'S ARGUMENT THAT IF PETITIONER'S CONTENTIONS WITH RESPECT TO THE RAILWAY LABOR ACT ARE CORRECT RESPONDENT COULD NOT COMPLY WITH THE FAIR LABOR STANDARDS ACT WITHOUT VIOLATING THE RAILWAY LABOR ACT.

On page 49 of its brief respondent says:

> "The Fair Labor Standards Act became effective on October 24, 1938. Respondent was required to comply with its terms or subject itself to the very stringent criminal penalties of the Act. But Petitioner argues that Respondent could not comply with the Fair Labor Standards Act because a compliance would mean a change in rate of pay or manner of payment, which, according to Petitioner, would be a violation of the Railway Labor Act. So, if this proposition of Petitioner be correct, Respondent could not have complied with the Fair Labor Standards Act even by a notice to the redcaps (presumably unless preceded by some action in response to Petitioner's letter of October 11) that beginning October 24, 1938, the redcaps would be paid 25 cents an hour, because such action would have been in violation of the Railway Labor Act, and, therefore, void."

Petitioner submits that this argument of respondent is based on a misconception of petitioner's position. We do not say, as respondent seems to think, that respondent

could not have commenced paying a wage of 25 cents an hour to the redcaps, as required by the Fair Labor Standards Act, without first entering into negotiations with the petitioner as their duly designated representative in an effort to make this change in the existing arrangement under which the redcaps were working. This change requiring respondent to pay to each of its employees engaged in interstate commerce, including its redcaps, a minimum wage of 25 cents an hour was made by the Fair Labor Standards Act, and required no agreement between the parties to become effective. The only subject for negotiation between respondent and petitioner, as representative of the redcaps, was whether respondent could appropriate the tips received by the redcaps to itself, and use these tips to satisfy its obligation to pay a wage under the Fair Labor Standards Act.

Respondent's duty under both the Fair Labor Standards Act and the Railway Labor Act under the situation existing on October 22, 1938, was clear. Prior to that date redcaps had been held to be employees of the carriers by the Interstate Commerce Commission, and respondent's redcaps had by more than a majority duly designated the petitioner as their representative for collective bargaining purposes under the Railway Labor Act. The Fair Labor Standards Act was to become effective October 24, 1938, and imposed the obligation on respondent of paying its redcaps a minimum wage of 25 cents per hour. If respondent desired to change the existing arrangement under which the tips were the property of the redcaps so as to invest itself with ownership of the tips, and thereby use them for the payment of the statutory minimum wage, it should have arranged to pay out of its own funds the wages required to be paid by the Fair Labor Standards Act, and it would then have been in a position to say to petitioner as the representative of the redcaps, "We think the tip

money should be turned over to us, and we propose a conference under the provisions of the Railway Labor Act to undertake to decide whether the redcaps shall keep all the tip money or whether the redcaps shall turn over the tip money to us, at least to the extent of the minimum wage we are required to pay them." In the meantime, however, respondent should have been paying the 25 cents an hour out of its own funds. In the event no agreement could have been reached in conference between the parties as to the ownership or application of the tips received by the redcaps, machinery is provided for in the Railway Labor Act by the use of which this issue could have been disposed of. Instead of doing what the Railway Labor Act commands, however, respondent undertook to treat with the redcaps individually, by serving on them the notices of October 22, 1938.

It is clear, therefore, that respondent could have complied with the Fair Labor Standards Act without violating the Railway Labor Act, and equally clear that respondent has failed to comply with either act.

THE IMPOSITION OF LIQUIDATED DAMAGES IS MANDATORY UNDER SECTION 16 (b) OF THE FAIR LABOR STANDARDS ACT.

Respondent's sixth point is that the trial court erred in awarding liquidated damages in addition to the wages which it found to be due, saying that liquidated damages are not recoverable under Section 16 (b) of the Fair Labor Standards Act in the absence of a showing of fraud, malice, willful violation of the law or gross negligence, and that there was no such showing in this case. Respondent deliberately, after the consideration of a number of plans of compliance with the Act, adopted the accounting and guarantee plan. Respondent, of course, must have known that it was taking a chance on the plan being held

to be a compliance with the Act, and yet it chose this plan in preference to others for reasons of its own, although there would have been no question whatsoever about the legality of other plans which it might have adopted. Furthermore, it is apparent from the fact that the notices served by other carriers throughout the country are identical in form that the carriers acted concertedly in an attempt to evade the burden imposed up them under the Act to pay the minimum wages provided for therein. Respondent was put on notice by petitioner's letter of October 24, 1938, that its redcaps would contend that the accounting and guarantee plan was not a compliance with the Act, and, therefore, it was not misled, but with such notice it determined to take its chance on the plan being held a compliance with the Act. We submit that under these circumstances the imposition of liquidated damages under Section 16 (b) of the Act would be warranted, even though it should be construed as respondent contends.

It is petitioner's position, however, that the imposition of liquidated damages under Section 16 (b) of the Act is mandatory in the event of a finding for wages, and that it is not necessary that the employer be guilty of bad faith before liquidated damages may be awarded. The pertinent part of this section reads as follows:

> "(b) Any employer who violates the provisions of section 206 or section 207 of this chapter shall be liable to the employee or employees affected in the amount of their unpaid minimum wages or their unpaid overtime compensation, as the case may be, and in an additional equal amount as liquidated damages."

This provision contains no language which would limit its operation to willful, intentional and deliberate violation of the provisions of sections 6 or 7 of the act, or to cases where it is shown that the employer is guilty of bad faith.

In this respect it differs from section 16 (a) of the act, the immediately preceding section which provides a criminal penalty for violation of the act, but limits such criminal penalties to persons who "willfully violate" the act. Thus section 16 (a) reads:

> "(a) Any person who willfully violates any of the provisions of section 215 shall, upon conviction thereof, be subject to fine of not more than $10,000.00," etc.

The omission of the word "willfully" from section 16 (b) is significant, and is indicative of the purpose of the Congress to make the assessment of liquidated damages mandatory. This is in keeping with the Congress' evident intention, as we have heretofore shown, that the act be strictly enforced. The Congress undoubtedly felt that if employers who desired to evade the act knew that even if they forced their employes to go to court and fight for their rights, the worst that could happen would be that judgment would be entered for the amount of wages, there would be no end to the litigation which the employers would force upon employees in order to discourage them from enforcing their rights. If an employer, however, is faced with the certainty that he will have to pay double if he does not obey the law, he will think twice before failing to comply with its provisions.

In all the decisions we have been able to find of the trial courts in actions instituted under Section 16 (b) of the Act, liquidated damages have been awarded in addition to the wages due, and in those cases where the question has been raised, the courts have ruled that liquidated damages must be awarded even though there is no showing of bad faith on the part of the employer. So far as we know, no appellate court has ruled on the point. In addition to the case at bar, in which Judge Atwell held that the imposition of liquidated damages was mandatory, and the Jacksonville Terminal case, the opinion in which discloses that

Judge Waller apparently felt the same way, the courts have held that the assessment of liquidated damages is mandatory in the cases of Harrison v. Kansas City Terminal Railway Company; 36 F. Supp. 434 (decided by the U. S. District Court for the Western District of Missouri), Emerson v. Mary Lincoln Candies, Inc., 17 N. Y. Supp. (2d) 851, 173 Misc. 531 (decided by the New York Supreme Court for Erie County), Reeves v. Howard County Refining Company, 33 F. Supp. 90, l. c. 92 (decided by the U. S. District Court for the Northern District of Texas), and Lefevers v. General Export Iron and Metal Company, 36 F. Supp. 838 (decided by the U. S. District Court for the Southern District of Texas), Eichorn v. Kilkenny (Com. Pl. Passaic County, N. J.), 1940 Wage & Hour Manual 354, Floyd v. Dubois Soap Co. (Com. Pl. Hamilton County, Ohio), 4 W. H. R. 77, Abroe v. Lindsay (Municipal Court, Minneapolis, Minn.), 4 W. H. R. 38, Magann v. Long's Baggage Transfer Co. (U. S. District Court, Western District of Virginia), 39 F. Supp. 742, McMillan v. Wilson & Co., Inc., et al. (Minnesota District Court, Ramsey County), 4 W. H. R. 409, Williams et al. v. General Mills, Inc. (U. S. District Court, Northern District of Ohio), 39 F. Supp. 849, Thompson v. Dougherty (U. S. District Court, District of Maryland), 40 F. Supp. 279, Reck v. Zarnocay (New York Supreme Court, N. Y. County), 4 W. H. R. 344, and Haddad v. Beckerman Shoe Corp. (Pa. Court of Com. Pl.), 4 W. H. R. 329.

In the Emerson case the Court, in answer to defendant's contention that since, when it found after an investigation by the United States Department of Labor that it owed plaintiff wages for overtime, it offered to pay the amount to plaintiff, it was not liable for liquidated damages, said:

> "We note that Section 16 (a) imposes criminal penalties for willful violations, while Section 16 (b) provides for the recovery of the additional moneys for any

violation, willful or not. Compare the statute above referred to, which gives a seaman extra wages if not paid in time (46 U. S. C. 596). Congress, in that statute enacted that the additional amount was to be recovered by the employee only if the failure to pay was 'without sufficient cause.' (See Collie v. Fergusson, 281 U. S. 52, 55.) No such limitation is found in the act we are considering here and we cannot write one in. Apparently the failure to pay the mandated overtime gives rise to liability under 16 (b) forthwith. The defense is therefore insufficient."

In the Reeves case Judge Davidson held that the plain, unambiguous provisions of the Fair Labor Standards Act imposing liquidated damages on employers for violation of the Act must be applied by the courts as written, since it is the prerogative of the Congress, and not of the courts, to shape the public policy of the nation, and Judge Allred in the Lefevers case held likewise, saying:

"Defendant, seeking to evade the assessment of an amount equal to the unpaid minimum wages and overtime compensation, pleads its own good faith and unintentional violation of the act; and tenders payment of the actual amount due. About the time plaintiff left defendant's service, or shortly thereafter, defendant was advised by a representative of the Wage and Hour Division that plaintiff was entitled to the benefits of the act. At that time defendant expressed its willingness to pay whatever amount was found by such representative to be due plaintiff under the act; but defendant never actually tendered any particular amount to plaintiff.

"(Conclusion.)

"I find nothing in the act relieving an employer from this liability under such circumstances. Sec. 216 (b) provides that any employer who violates this law shall be liable, not only for the unpaid minimum wages and unpaid overtime, but for 'an additional equal amount as liquidated damages' and for reasonable attorneys' fees.

"Judgment will be for plaintiff for the sum of $882.44, the amount due him as unpaid minimum wages and overtime compensation, and an equal amount as liquidated damages; plus a reasonable attorney's fee of $200.00; or a total of $1,964.88."

Respondent has cited no cases arising under the Fair Labor Standards Act holding that liquidated damages can only be assessed under Section 16 (b) where there is a showing of bad faith on the part of the employer, but relies on other cases which are not in point, and are easily distinguishable. The cases of Scott v. Donald, 165 U. S. 48, 41 L. Ed. 632, and Tinker v. Scharnhorst, 129 Okla. 118, 263 Pac. 645, were cases in which the circumstances necessary to the imposition of punitive or exemplary damages in an action in tort were discussed, and are, of course, not applicable here. The holding of the Court in the case of Tilghman v. Proctor, 125 U. S. 136, 31 L. Ed. 664, a patent case, that the Court might whenever the circumstances of the case appeared to require it, inflict vindictive or punitive damages by rendering judgment for not more than thrice the amount of the verdict is distinguishable because the section of the patent statutes there construed, now 35 U. S. C. A., Section 67, reads:

"The Court **may** enter judgment thereon for any sum above the amount found by the verdict as the actual damages sustained, **according to the circumstances of the case**, not exceeding three times the amount of such verdict." (Emphasis ours.)

We submit that the uniform construction which the trial courts have so far put on Section 16 (b) of the Act is correct, and that the trial court did not err in awarding liquidated damages in addition to the wages due.

Respectfully submitted,

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